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No. 90-1802

In The

SUPREME COURT of the UNITED STATES

October Term, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Is the Petitioner Darden an employee under the terms of the Employee Retirement Income Security Act, 29 U.S.C. Sec. 1002(6)?

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v.

ROBERT T. DARDEN,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

THE FACTS

The plaintiff worked as an insurance agent for Nationwide from September, 1962

until November, 1980. (JA-37)[1]. During this period, Darden and Nationwide entered into a series of eight (8) Agent's Agreements, the most recent of which became effective January 1, 1977. (JA-37). The Agent's Agreement provided that Darden was to exclusively represent Nationwide. (JA-38).

The Agent's Agreement, along with other documents given to the plaintiff during the time he served as an agent for Nationwide, provided for a retirement plan for Nationwide agents known as the Agent's Security Compensation Plan. (JA-11-18). The Agent's Security Compensation Plan was composed of the Deferred Compensation Incentive Credit portion and the Extended

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[1] References to the Joint Appendix are designated "JA", and references to the Petition for Writ of Certiorari are designated "Pet. App."

Earnings portion. Participation in the Security Compensation Plan was limited to agents with at least five years of service with Nationwide. (JA-38). Under the Deferred Compensation Incentive Credits, an eligible agent was credited with deferred compensation incentive credits according to a scale based on each year's total renewal commissions. (JA-11-12). Each year amounts based upon the formula are credited to the agent's account in a group annuity contract with Nationwide Life Insurance Company. (JA-24a). The Plan contained a vesting schedule known as the "Rule of 45." (JA-13). An agent whose employment with Nationwide terminated would be eligible to begin receiving a part of the deferred compensation portion of the Plan at age 50 with the percentage received gradually increasing up to 100% at age 60. (JA-15).

The Fourth Circuit in Darden v. Nationwide Mut. Ins. Co., 1122 F.2d 203 (4th Cir. 1991) (Darden II), found that the Extended Earnings plan was not a retirement plan subject to ERISA. (Pet. App. 10a-12a).

An agent could elect various methods of payment of benefits under the Agent's Security Compensation Plan. (JA-15-16). Darden elected to have his benefits payable as a life only annuity. (JA-34a-35a). The most recent agent's benefit statement which Darden received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664 in the Deferred Compensation Incentive Credits plan and $65,706 in the Extended Earnings plan. (JA-34a).

Under paragraph 9 of the Agent's Agreement, the agent for Nationwide had the right to cancel the Agreement at any time

after written notice. (JA-11). Paragraph 11(f)(1) of the Agent's Agreement provided that the liability of Nationwide for benefits under the Agent's Security Compensation Plan would cease and terminate if, within one year of cancellation of the Agent's Agreement, the agent engaged in the fire, casualty, health and life insurance business within a 25-mile radius of the former business location of the agent. (JA-17). Paragraph 11(f)(3) provided that the liability of Nationwide for benefits under the Agent's Security Compensation Plan should cease and terminate if the agent at any time after cancellation of the Agreement induced a policyholder of Nationwide to cancel or place any insurance contract in force with Nationwide or furnish the name of a policyholder or a competitor. (JA-17).

Although Darden sold several types of insurance, including life, homeowner and commercial insurance, his predominant market was automobile insurance. (JA-39). Darden testified that North Carolina agents writing automobile liability insurance coverage, which is mandatory in North Carolina, cannot discriminate against drivers based on age, sex, credit or bad driving records. (JA-44). If Nationwide received an application for automobile liability coverage for a driver it did not wish to cover, then coverage would be ceded to the North Carolina Reinsurance Facility in which companies writing automobile liability insurance coverage in North Carolina participated. (JA-44-45).

Since Darden's office was located close to Fort Bragg, many of his customers were military personnel. Because of their

age, automobile liability insurance coverage for nearly all military personnel was ceded to the North Carolina Reinsurance Facility. (JA-45).

Nationwide did not want Darden serving military personnel because coverage for them was ceded to the Reinsurance Facility. It took a number of steps to discourage him from doing so. The district and regional manager advised Darden to move his office to downtown Fayetteville away from Fort Bragg and to close his office during the hours of 11:00 a.m. to 12:30 p.m. during the military lunch hour. (JA-45-46). Darden declined to discontinue serving military personnel.

Darden was terminated by Nationwide in a letter dated October 29, 1980. (JA-23). Upon his termination, Darden turned over to Nationwide, pursuant to the Agent's

Agreement and the termination letter, all of the Nationwide policy files in his office which consisted of approximately 1200 to 1500 files. (JA-48). Nationwide then distributed out the business which they wished to retain to existing agents and steered the undesirable business to Darden. (JA-25). A memo dated December 11, 1980 between Nationwide supervisory employees stated:

> Fortunately, Agent Darden has acquired a voluntary company and is in the process of transferring the business to them. This action is definitely in our best interest. (JA-26).

Following his termination, Darden went to work as an independent insurance agent representing various insurance companies working out of the same office he had maintained as a Nationwide agent. (JA-40). Nationwide then terminated his retirement

benefits pursuant to paragraph 11(f) of the Agent's Agreement. (JA-41).

SUMMARY OF ARGUMENT

In Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986) (Darden I), the Fourth Circuit formulated a three-prong test for determining whether Darden was an employee under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1001 et seq. The Fourth Circuit rejected the common law agency test and used a standard based on the purposes of ERISA as set forth in the statute. (Pet. App. 40a).

The Fourth Circuit was correct in rejecting the common law agency test. This test distinguishing between an employee and an independent contractor was derived from common law of vicarious liability. Experiences of the courts in applying the common law test to vicarious liability

issues has been unpredictable and distinguished by decisions based on unimportant and minute details. Common law agency standards have been transported into statutory definitions of employment with no success at clarity or predictability since the issues arising from vicarious liability are entirely different from those arising under various statutes. The experience of the courts using the common law agency test for distinguishing between an employee and an independent contractor under worker's compensation has proven to be a failure and has generated endless litigation.

The three-prong test derived from the purposes of ERISA by the Fourth Circuit produces a standard that is logically relevant and directly related to the purposes of ERISA. Since it is directly related to the purposes of ERISA, it is a

more predictable and logical standard than the common law agency principles which are unrelated to the purposes of ERISA.

Based on the factors considered by the Fourth Circuit in Darden I, as well as additional factors related to the purposes of ERISA, Darden is an employee under the provisions of ERISA and is within the class protected by the nonforfeitability provisions of the statute.

ARGUMENT

I. THE COMMON LAW AGENCY TEST SHOULD NOT BE USED TO DEFINE "EMPLOYEE" UNDER ERISA.

The common law distinction between employees and independent contractors arose as a method of determining whether one entity is liable for the tortuous conduct of another entity. Legal scholars have not agreed on the origin of the doctrine of vicarious liability. Harper, James and

Gray, The Law of Torts, 2nd ed., Sec. 26.2 (1986). The authors of the above treatise wrote that it was not necessary to resolve its historical origin since "it is to be understood now principally in terms of its effectiveness in achieving contemporary social objectives, rather than on grounds of conceptual appeal or the claims of history." Id., Sec. 26.2, p. 10.

The principal issue courts have addressed in discussing vicarious liability is why an employer, who is not at fault, should be liable for the conduct of a negligent employee. Various reasons have been utilized, but none has been entirely satisfactory. For example, expanding liability to the employer would allow injured parties a better chance of recovery. Mechem, Law of Agency, 2nd ed., Sec. 1856 (1914). But one commentator has

denounced this as an effort to reach a deep pocket. T. Baty, Vicarious Liability 154 (1916).

A combination of factors appear to be the best explanation for extending liability to employers, including the impetus it provides to employers to prevent accidents, compensation to victims, and the desirability of spreading the costs of injuries. Obviously, significant costs are incurred by various industries. Courts are not well equipped to deal with the complex issues which arise. However, some courts have been forthright in recognizing the problems. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 175 (2nd Cir. 1968).

Given the complexity and controversial nature of the problems inherent in vicarious liability, it should be no

surprise that results vary among the courts. Harper, James, and Gray in their Treatise stated: "The cases are by no means harmonious. . . . The result has often been made to turn on trivial factual differences." Harper, James, and Gray, Sec. 26.11, p. 62, fn. 6.

This Court specifically recognized the unreliability and unpredictability of the common law agency test for distinguishing between an employee and an independent contractor in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In its opinion the Court stated:

> Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field determining vicarious liability in tort. It becomes more so when

> the field is expanded to include all of the possible applications of the distinction.

322 U.S. at 121.

The issues the courts have wrestled with over the past century concerning vicarious liability are not remotely related to the issues Congress addressed in ERISA. Under the law of agency, control is considered a key factor in assessing the employer with damages caused by an employee. This seems logical in most cases since control implies some degree of fault on the part of the employer for torts of the employee. Under ERISA, fault is not an issue.

Since the rationale for vicarious liability bears no relationship to the purposes of ERISA, results of using the common law test have been unpredictable. In Plazzo v. Nationwide Mut. Ins. Co., 697

F.Supp. 1437 (N.D. Ohio 1988), rev'd. 892 F.2d 79 (6th Cir.), cert. denied, 111 S.Ct. 370 (1990), the trial court using the common law test found that Plazzo, a Nationwide agent, was an employee under ERISA after a seven-day bench trial. The Sixth Circuit reversed the trial court because they had previously overruled another trial court's determination using a combination of the common law and Darden factors that a Nationwide agent was an employee in Woolcott v. Nationwide Mut. Ins. Co., 884 F.2d 245 (6th Cir. 1989). In Darden's case, the U.S. Magistrate found that Darden was an employee using the common law test but the trial court overruled him in issuing summary judgment for Nationwide. In Holt v. Winipisinger, 811 F.2d 1532 (D.C. Cir. 1987), the Court reversed a finding by the trial court using

common law agency principles that the plan participant was not an employee under ERISA.

This Court had occasion to pass on the question of whether an insurance agent was an employee or an independent contractor using the common law agency test in NLRB v. United Ins. Co., 390 U.S. 254 (1968). In its opinion, the Court relied on the "total factual context" and certain "decisive factors", 39 U.S. at 258, in finding that the insurance agents were employees under the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq. The Magistrate in this case relied heavily on NLRB v. United Ins. Co., 390 U.S. 254, in finding that Darden was an employee under ERISA.

This Court gave little guidance as to the meaning of "total factual context" or how to determine which were "the decisive

factors." Without any policy guidelines except those contained in the vicarious liability doctrine which bears no relationship to policies under the National Labor Relationship Act, the Court faced a difficult task in rationalizing its decision.

The Restatement (Second) of Agency Comments Sec. 220(c) (1958) states that the relationship of master and servant is not capable of exact definition, but it is necessary to do so in order to ascertain the liability of the master to third persons. The Comments, Sec. 220(1)(g) note that the tests given in the Restatement are used under Employers' Liability Acts and the Worker's Compensation Acts but "[b]eyond this there is little uniformity of decision." This Comment further found that persons have been determined to be

employees under federal and state Wage and Hours Act, the purpose of which is to raise wages and working conditions, who were clearly not servants under the Restatement test.

The history of the attempt to distinguish between employees and independent contractors in worker's compensation laws should be considered in defining an employee under ERISA. Larson's Workmen's Compensation Law (1991) relates that the definition of the term "employee" for purposes of vicarious liability, worker's compensation, labor legislation, social security, and other enactments has "probably produced more reported cases than any definition of status in the modern history of law." A. Larson, Larson's Workmen's Compensation Law, Sec. 43.10. Larson points out that there was little

disagreement over the test distinguishing employment from independent contractor status. The Treatise continues:

> It is, however, the application of these rules to an infinite variety of borderline cases that brings about this amount of litigation and disagreement. It has been said that precedents may be found on both sides of almost every situation in which the question could arise. The explanation of this paradox- agreement on principles and disagreement in actual decisions - seems to lie partly in the relative weight given to the various tests of status and partly in the extent to which courts define status in view of the purpose served by the particular legislation rather than as a static concept."

Larson's, Sec. 43.10.

Larson explains the problems which have arisen under workers' compensation laws as follows:

> The source of most of the difficulty in adopting bodily the common-law definition of servant for compensation purposes can now be easily explained, in terms of the above analysis: <u>The purpose for which the definition is used in compensation law is entirely different from the common-law purpose</u>.

Larson's, Sec. 43.42 (emphasis in original).

The right to control test is gradually giving way to the relative-nature-of-the-work test in worker's compensation because of the logical irrelevance of the right to control test and the vagueness of the test. There are no rules as to the weight to be given to the various factors in the common law agency test and the right to control is a conclusion seldom capable of direct proof. Larson's, Sec. 45.10.

Applying the right to control test to Darden leads to the conclusion he is an employee. The trial court found Darden lacked sufficient bargaining power to bargain over the terms of his agreement with Nationwide. (Pet. App. 20a-21a). The

Court cited an outline of changes in the Agent's Agreement made in 1980 which advised agents that "[a]s in the past, our position will be that any agent refusing to sign the new Agreement will have his or her existing Agreement cancelled as of 1/1/81." (JA-21a). Nationwide was in a position to "allow" Darden to appear to be an independent contractor while retaining the right to maintain control over him, including the right to terminate him at will.

In NLRB v. United Ins. Co., 390 U.S. at 259, this Court looked to practical realities in holding that the insurance agent was an employee. The Court stated:

> Probably the best summation of what these factors mean in the reality of the actual working relationship was given by the chairman of the board of respondent company in a letter to debit agents about the time this unfair labor practice proceeding arose: "if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agents final [sic]."

Darden and the insurance agents in NLRB v. United Ins. Co., 390 U.S. 254 had no control over the terms of their agreements with the insurance companies. In Darden's case, this included the inability to bargain over nonforfeitability of pension rights. If the common law right to control is applied as it was in NLRB v. United Ins. Co., 390 U.S. at 259, Mr. Darden is an employee under ERISA.

II. DARDEN IS AN EMPLOYEE UNDER THE PROVISIONS OF ERISA.

A. The proper standard for defining employee under ERISA should be based on the purposes and functions of ERISA.

Darden brought this action pursuant to Sec. 502(a)(1) of ERISA, 29 U.S.C. 1132(a)(1) which provides that a "participant" may sue to recover benefits due him or her under a retirement plan. The statute defines "participant" as any "employee or former employee" who is or may become eligible to receive a benefit from an employee benefit plan covering employees of such employer. 29 U.S.C. Sec. 1002(7). The statute then defines an employee as "any individual employed by an employer." 29 U.S.C. Sec. 1002(6).

Webster's Dictionary defines "employ" as "to use or engage the services of - a lawyer to straighten out a legal tangle." Webster's Third New International Dictionary (1966). The term "employed by" in the statute includes "any individual" whose services are engaged by an employer.

The term "employer" includes persons acting directly as an employer or indirectly as such in the interest of the employer in relation to an employee benefit plan. 29 U.S.C. Sec. 1002(5).

Although the definition of employee is the question before the Court, it is used to determine who is a participant so that its significance is to determine the extent of coverage of ERISA. Thus, a functional approach to the issue is appropriate.

In Community For Creative Non-Violence v. Reid, 490 U.S. 730 (1989), this Court held that the "work for hire" provisions in Section 101 of the Copyright Act of 1976, 17 U.S.C. Sec. 101 et seq., should be interpreted using common law agency law meaning. The Court stated:

> Nothing in the text of the work for hire provisions indicates Congress used the words "employee" and "employment" to

describe anything other than "'the conventional relation of employer and employee,'" Kelley, supra, at 323, 42 L.Ed.2d 498, 15 S.Ct. 472 [Kelley v. Southern Pacific Co., 479 U.S. 318 (1974)], quoting Robinson, supra, at 94, 59 L.Ed. 849, 35 S.Ct. 491 [Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84 (1915)]; compare NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124-132, 88 L.Ed. 1170, 64 S.Ct. 851 (1944) (rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition).

490 U.S. at 740.

In NLRB v. Hearst Publications, Inc., 322 U.S. 111, this Court stated that one purpose of the National Labor Relations Act, 29 U.S.C. Sec. 151, is to avoid obstructions to the free flow of commerce which result from strikes and labor unrest. The Court pointed out that labor unrest can occur as a result of disputes between some who are technically independent contractors

and their employers as well as those who are employees, for those purposes, and their employers. Inequality of bargaining power, dependence on a daily wage, and inability to resist arbitrary treatment may characterize the working conditions of one group as well as the other. The Court then stated:

> In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, these characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

322 U.S. at 128.

Congress' findings and declarations of policy of ERISA, 29 U.S.C. Sec. 1001, represent a major change for pension plans

from being a matter of private contract between employers and employees governed by the common law to a matter of national public interest affecting the lives of millions of employees. One of the principal goals of ERISA as expressed by Congress was to address the problem ". . . of many employees with long years of employment [who] are losing anticipated retirement benefits owing to the lack of vesting provisions . . ." 29 U.S.C. Sec. 1001. To meet this problem, ERISA provided that a participant's pension became nonforfeitable after a period of service using three alternative methods. 29 U.S.C. Sec. 1053(a).

The definitions of "participant," "employer," and "employee" in ERISA fail to indicate any intention on the part of Congress to restrict the coverage of ERISA

to persons considered employees under common law agency principles. In Community For Creative Non-Violence v. Reid, 490 U.S. 730, the Copyright Act of 1976 provided that copyright ownership vests in the author, except in instances where the work is made "for hire" under which ownership vests in the employer. 17 U.S.C. Sec. 201(a), 201(b). Section 101 of the 1976 Act provides that a work is "for hire" if it is prepared "by an employee within the scope of his or her employment." 17 U.S.C. Sec. 101.

In contrast to ERISA, Congress did not define the term "employee" in the Copyright Act of 1976. This Court relied on the extensive legislature history of the Copyright Act as well as the language of the Act defining a "work for hire," 17. U.S.C. Sec. 101, in concluding that common

law agency principles should be utilized in determining whether a work was "for hire." In this case, there is no legislative history reflecting a compromise of conflicting views as in the case of the Copyright Act of 1976 nor are the relevant statutory definitions as restrictive. In addition, ERISA is the type of remedial social legislation in which this Court has looked to the purposes of the statute to determine the extent of coverage through the definition of the term "employee." United States v. Silk, 331 U.S. 704 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

B. This Court has repeatedly taken a functional approach to ERISA.

In Massachusetts v. Morash, 490 U.S. 107 (1989), this Court held that an employer's policy of paying discharged employees for unused vacation time from the

general assets of the company did not constitute an employee welfare benefit plan under ERISA, 29 U.S.C. Sec. 1002(1). This Court in its opinion stated:

> Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed - a danger Congress chose not to regulate in ERISA.

490 U.S. at 115.

In Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987), this Court held that an employee's state law claim for the improper processing of a disability claim under an insured employee benefit plan was pre-empted by ERISA. 29 U.S.C. Sec. 1144(a). The Court in its opinion noted that "[i]n expounding a statute, we

must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 481 U.S. at 52. In support of its holding, the Court cited the remarks of Sen. Javits that Congress intended that a body of substantive law would be developed by the courts to deal with issues arising under ERISA. 481 U.S. at 56.

In Firestone Fire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), this Court held that the term "participant" under ERISA, 29 U.S.C. Sec. 1002(7), referred to employees "in or reasonably expect to be in, currently covered employment" or former employees who have "a reasonable expectation of returning to covered employment" or have "a colorable claim" to vested benefits. 489 U.S. at 117. The

Court supported its holding by stating that Congress' purpose in enacting the ERISA disclosure provisions would not be thwarted by the Court's reading of the term "participant." 489 U.S. at 118.

The holdings in the Morash, Dedeaux, and Bruch cases reflect a functional approach by this Court in interpreting the provisions of ERISA. In the Morash case, the Court looked to the purposes of ERISA in rejecting the argument that vacation pay was covered by ERISA. In the Bruch case, the Court affirmed its definition of "participants" in ERISA by determining that the proposed definition would, in fact, serve the purposes of the legislation. In Dedeaux, the Court renewed the longstanding admonition to look to the object and policy of the whole law in interpreting ERISA.

In an Opinion Letter issued in 1977, the Department of Labor stated that insurance agents whose business activity was predominantly with one life insurance company were employees under ERISA. Dep't of Labor, Op. Ltr. 77-75A, at 2 (Sept. 21, 1977). The Opinion Letter expressed the view of the Department of Labor that the term "employee" under ERISA should be interpreted to serve the protective purposes of the statute and not according to technical concepts. Subsequently in an Opinion Letter issued in 1991, the Department of Labor stated that defining the employment relationship under ERISA should rely on common law agency principles taking into account the remedial purposes of ERISA. Dep't of Labor, Op. Ltr. No. 91-17A at 3 (Apr. 5, 1991) (reprinted at Reply to Br. in Opp. App. 4a). Even though the

Opinion Letters appear to disagree in some respects, both letters do agree that the remedial purposes of ERISA should be considered in defining the term "employee."

C. Including Darden as an employee under ERISA best serves the purposes of the Statute.

The purposes of ERISA are far better served by utilizing a definition of "employee" based on those goals rather than the common law version which serves an entirely different purpose. The wisdom of using a definition functionally related to the goals of the statute can be demonstrated in Darden's case. Based on Nationwide's establishment of a comprehensive retirement plan for its agents, Darden had a reasonable expectation that he would ultimately receive benefits. (Pet. App. 16a-17a). In Massachusetts v. Morash, 490 U.S. 107, this Court found

that the danger of defeated expectations for vacation pay were no different than those for wages which Congress chose not to regulate under ERISA. In contrast, Darden had a reasonable expectation of receiving his retirement benefits which is clearly an expectation covered by ERISA.

Darden relied on his expectation by remaining an employee of Nationwide for eighteen years and foregoing other significant means of providing for his retirement. (JA-18a). Nationwide explicitly encouraged Darden and other agents to rely on the Agent's Security Compensation Plan as the foundation upon which to build a retirement plan. (Pet. App. 19a). Insurance agents who are independent agents and represent more than one insurance company can sell their business when they retire. (Pet. App. 18a;

JA-50). As a Nationwide Agent, Darden could not sell his agency when he retired since the policy expiration belonged to Nationwide. (Pet. App. 18a; JA-50). Without the benefit of disposing of his agency upon retirement, Darden was, in fact, dependent on the Nationwide retirement plan just as the company encouraged him to be.

Darden's reliance on the Nationwide retirement plan brings him squarely within the class of persons covered by the objectives and policies of ERISA. His reliance distinguishes him from independent agents who can rely on the sale of their agencies to provide retirement benefits to them and their families.

Darden and his fellow Nationwide agents lack sufficient bargaining power to bargain over the nonforfeitability of their

Nationwide retirement benefits. (Pet. App. 20a-23a). Persons who lack such bargaining power are the very persons whom Congress intended to protect through the vesting provisions of ERISA.

Nationwide was pleased that Darden continued in business representing other insurance companies following his termination by Nationwide. (JA-25-26). The covenant in Nationwide's Agent's Agreement was enforceable in the North Carolina state courts, see A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983), but Nationwide chose not to enforce it. Nationwide did not require the forfeiture of retirement benefits to obtain protection from competition by former agents. The detrimental effect on Darden and other agents of enforcing the forfeitability

provisions far outweighs any possible burden placed on Nationwide. This is particularly true in Darden's case where Nationwide was glad he went into competition with the company.

In Holt v. Winipisinger, 811 F.2d 1532, both parties agreed that common law principles of agency should apply when defining "Employee" under ERISA. In reversing the District Court's holding that the plaintiff was not an employee for the time at issue, the Court stated: "To allow employees to contract away ERISA's vesting provisions would frustrate the purpose of the statute, which was enacted to protect employees from just such unfair deprivations of pension benefits." 811 F.2d at 1541. The purpose of assuring the equitable character of retirement plans as set forth in ERISA, 29 U.S.C. Sec. 1001 is

not served by excluding Mr. Darden from coverage by ERISA.

The Fourth Circuit's test for determining whether Darden is an employee under ERISA is closely related to the purposes of ERISA. It also correlates in relevant respects to the common law agency principles as set forth in the Restatement (Second) of Agency Sec. 224 (1958)[2]. The

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[2] The Restatement (Second) of Agency Sec. 220, sets forth the following ten factors to consider in determining who is a servant:

Sec. 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which,

by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Court need not disregard entirely the factors in the common law agency test as set forth in the Restatement. The common law factors can be adapted to serve the purposes of ERISA especially in borderline cases such as this.

The first and most important factor is the extent of control. The Comment in the Restatement (Second) of Agency, Sec. 220, Subsection (2)(h) states that the master-servant relationship is indicated by an agreement for close supervision or de facto close supervision. This determination is related to the third part of the Fourth Circuit's test of whether Darden had sufficient bargaining power to control the terms of his agreement. As previously argued, the trial court found that Darden lacked such bargaining power and thus,

Nationwide had the requisite control under ERISA.

The common law agency test includes a determination of whether the employer or worker owns the place of work and tools of the trade. For purposes of vicarious liability, this test would be helpful in determining the dependence of the worker on the employer. This is equivalent in Darden's case to the ownership of his agency's policy expirations which were the most valuable asset of his insurance agency. The fact that Nationwide owned the expirations deprived Darden of a source of retirement benefits and was thus reflected in his reliance on Nationwide's retirement plan for his retirement.

The length of time the person is employed in the common law agency test is derived from the fact that usually

employees are employed for longer periods than independent contractors. The Fourth Circuit's test included length of service in order to weigh the strength of Darden's reliance on his expectation of actually receiving a retirement benefit.

The common law agency test includes a determination of whether the parties believe they are creating the relationship of master and servant. This tests the expectations of the parties. The Fourth Circuit considered as its first factor whether Nationwide took action that created a reasonable expectation on the part of Darden that benefits would be paid to him. This also tests the expectations of the parties, but in a manner directly related to ERISA's purposes.

Congress left to the courts the issues as to the parameters of coverage of ERISA

arising under the definition of employee. These issues should be addressed on a case-by-case basis with a federal common law gradually evolving under ERISA. Congress is free to intervene at any time to provide guidance through legislation.

The factors considered by the Fourth Circuit in determining that Darden was an employee of Nationwide are derived from the purposes of ERISA and should be utilized in all cases. Other factors related to the purposes of ERISA may be considered as well. In Darden's case, the factors relied on by the Fourth Circuit as well as other relevant factors show that Darden was an employee of Nationwide under ERISA and was within the class sought to be protected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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